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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *Appellant*

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT and SPENCER B. EDDY, constituting the Public Service Commission of the State of New York, and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Appellees.*

STATEMENT AS TO JURISDICTION

Nature of the Case

The appellant, Consolidated Edison Company of New York, Inc., is a public utility operating in the City of New York, subject to the jurisdiction of the New York Public Service Commission under the provisions of the New York Public Service Law.

On May 29, 1946, the Public Service Commission formally instituted under the designation of Case No. 12455 an investigation and hearing relative to the determination of just and reasonable rates for electric service furnished by

the appellant. Hearings began on June 28, 1946, and continued from time to time to December 2, 1948, when the record was closed. On December 30, 1948, the Commission issued an order in P.S.C. Case No. 12455, pursuant to Section 114 of the New York Public Service Law, requiring the appellant to make effective a so-called "temporary reduction" in appellant's rates for electric service supplied to general consumers under thirteen separate Service Classifications. The reduction is a flat ten per cent reduction in bills to general electric consumers (exclusive of fuel charge), estimated to be in gross not less than $21,500,000 a year and in net, after income and gross revenue taxes, not less than $12,427,000 a year.

By a petition verified January 6, 1949, the appellant asked the Commission for a rehearing and for a postponement of the effective date (January 10, 1949) of the temporary rates. On January 13, 1949, the Commission denied the petition for rehearing.

Following the denial of its petition, the appellant commenced a proceeding in the Supreme Court of the State of New York, Albany County, for review of the Commission's Order and determination, pursuant to Article 78 of the New York Civil Practice Act. Pending the determination of the review proceeding, the appellant sought and obtained an order from the Appellate Division staying and suspending the temporary rates (*Matter of Consolidated Edison Co.* v. *Maltbie,* 275 App. Div. 731). Upon appeal by the Commission, the order granting the stay was reversed by the Court of Appeals (*Matter of Consolidated Edison Co.* v. *Maltbie,* 299 N. Y. 172), and the temporary rates were continued in effect pending review.

In the review proceeding instituted under Article 78, the Appellate Division, by a divided Court (Foster, P. J., dissenting), annulled the Order of the Commission on the law

(*Matter of Consolidated Edison Co.* v. *Maltbie*, 275 App. Div. 475). Pending appeal by the Commission from the latter decision, the Appellate Division's order of annulment was stayed. Upon appeal by the Commission, the Court of Appeals, also by a divided Court (Conway and Dye, JJ., dissenting), reversed the decision below and reinstated the Order and determination of the Commission (*Matter of Consolidated Edison Co.* v. *Maltbie*, 300 N. Y. 196). Appellant applied for reargument or, in the alternative, for an amendment of the remittitur of the Court of Appeals. On January 13, 1950, the Court of Appeals made an order denying the motion for reargument and amending the remittitur as requested (Id., 300 N. Y. 645).

Date of Order and Judgment Sought to Be Reviewed and Date of Application to Appeal

The order and judgment of the Supreme Court of the State of New York sought to be reviewed was entered on January 23, 1950, upon the final decision and order of the Court of Appeals made January 13, 1950, denying the appellant's motion for reargument and amending the remittitur of the Court of Appeals as requested.

The date on which the application for appeal is presented is April 12, 1950.

Opinions Below

Attached hereto as Exhibits A to G, respectively, are the following:

Order of the Commission, dated December 30, 1948, in P.S.C. Case No. 12455, prescribing temporary electric rates for the appellant (Exhibit A);

Memorandum approved by the Commission in support of its temporary rate Order—78 P.U.R. (NS) 221 (Exhibit B);

Opinion of the Appellate Division, Third Department, granting a stay of the temporary rates pending the review proceeding—275 App. Div. 731 (Exhibit C);

Opinion of the Court of Appeals reversing the stay order —299 N. Y. 172 (Exhibit D);

Majority and dissenting opinions of the Appellate Division, Third Department, in the review proceeding under Article 78—275 App. Div. 475 (Exhibit E);

Majority opinion and dissenting memorandum of the Court of Appeals reversing the order of the Appellate Division and reinstating the Order of the Commission—300 N. Y. 196 (Exhibit F);

Memorandum of the Court of Appeals denying reargument and amending remittitur as requested—300 N. Y. 645 (Exhibit G).

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is 28 U.S.C. § 1257 (New Title), which provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statutes of the State Involved

The statutes of the State, the validity of which is involved, are the Order of the Public Service Commission, dated December 30, 1948, and Section 114 of the New York Public

Service Law (Laws of New York, 1934, C. 287, pp. 796-797; see, also, 47 McKinney's Consol. Laws of N. Y., Pub. Serv. L., § 114). The Commission's Order is attached hereto as Exhibit A. Section 114 of the Public Service Law provides:

"§ 114. *Temporary Rates*

"To facilitate prompt action by the commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records, including a list or inventory of all of the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the retirement or replacement of said physical property.

"The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided.

"Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined

and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

Manner in Which the Federal Questions Were Raised

In its petition to the Public Service Commission for a rehearing, in its petition for review in the Supreme Court of the State of New York, and in its briefs before the New York Courts, the appellant alleged and asserted, specifically and in detail, that the Order of the Commission fixing temporary rates and Section 114 of the Public Service Law, construed to authorize the making of the Order, were unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Thus, in its petition for rehearing before the Commission, the appellant claimed that it had "been denied a full and fair hearing in that the Commission has not purported to have given consideration to much of the evidence presented by the Company" (fol. 249),[1] that the rate of return provided by the temporary rates was "wholly arbitrary and unreasonable, is insufficient to enable the Company to maintain its credit and attract capital on advantageous terms" (fol. 280), and that the Order of the Commission was contrary to "constitutional guarantees of due process of law" (fol. 275).

The appellant's petition for review by the New York Supreme Court under Article 78 of the New York Civil Practice Act, alleged (fols. 126, 129) that Section 114,

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[1] Folio references are those in the Record on Review and Appeal in the Court of Appeals.

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construed to enable the Commission to prescribe temporary rates "without giving any full or fair consideration to the evidence in the record before the respondent [Commission]", would operate "to deprive the petitioner [appellant] of its property without due process of law and to deny to the petitioner the equal protection of the laws, in violation of Amendment XIV of the United States Constitution." It further alleged (fol. 131) that the Commission's Order deprived the appellant of Constitutional guarantees in that the "rates and charges are less than just and reasonable rates and charges, and do not provide a fair return upon the property used by the petitioner for electric service to its customers."

The opinion of the Appellate Division in the review proceeding, upon the basis of which the two dissenting Justices in the Court of Appeals voted to affirm, stated (*Matter of Consolidated Edison Co.* v. *Maltbie*, 275 App. Div. 475, 481):

> "• • • If the contention of the respondents were sustained the commission could always resort to an estimate by the simple expedient of adopting a method of computing depreciation which would produce an amount in excess of that produced by the method used by the utility. In result this would be the grant of an arbitrary power to determine the temporary rate • • •."

Point II of this appellant's brief before the Court of Appeals on the merits of the review proceeding (pp. 60-72) was stated as follows (p. 60):

> "Assuming that the question of depreciation presented issues of fact, the Commission was bound to consider and weigh all of the relevant evidence given by the opposing witnesses, and its failure to do so amounted to a denial of due process of law to the Company."

Point III of the same brief (pp. 72-85) was stated as follows (p. 72):

> "Section 114 of the Public Service Law, if construed to authorize the present action of the Commission, is unconstitutional."

Under this point it was argued by the appellant (pp. 72-73):

> "As interpreted and applied by the Commission in the instant case, Section 114 would permit the Commission to resort to the device of fixing temporary rates, for an indefinite period, upon very limited factors in derogation of established constitutional principles, in order that the Commission may avoid its responsibility for rendering a decision upon the whole record of closed hearings as to just and reasonable rates; to predicate temporary rates upon an arbitrary and hybrid formula, which represents neither the net investment in the entire property of the Company used and useful in the public service nor the fair value of the property; to adopt arbitrarily a rate of return which is plainly insufficient to enable the Company currently to meet the cost of capital; to disregard the actual wage costs required for rendering safe and adequate service to the public, and to disregard all relevant evidence presented by Company witnesses, and avoid weighing the evidence in the record and making specific findings and reasoned conclusions thereon.
>
> "We submit that such a construction of Section 114 and the resulting rate Order of the Public Service Commission would, if sustained in this case, clearly violate the Company's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 6 and 11 of the First Article of the New York State Constitution."

The Federal questions thus raised were passed upon by the Court of Appeals. As stated in the amended remittitur of that Court:

> "Questions under the Federal Constitution were presented and passed upon by this Court, viz., whether

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Section 114 of the Public Service Law of the State of New York and the order of the Public Service Commission dated December 30, 1948, in Case No. 12455, made pursuant thereto, violated any of the rights of the respondent guaranteed by Section 1 of Amendment XIV of the Federal Constitution. This Court held that the aforesaid statute and order of the Commission did not violate any of the rights of the respondent guaranteed by that provision of the Federal Constitution."

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of this Court in the case at bar are:

Bluefield Co. v. *Public Service Commission*, 262 U. S. 679, 683;
Northern Pacific v. *Department of Public Works*, 268 U. S. 39, 42;
King Manufacturing Co. v. *Augusta*, 277 U. S. 100, 114;
Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 299-300;
Lincoln Union v. *Northwestern*, 335 U. S. 525, 529;
Kovacs v. *Cooper*, 336 U. S. 77, 78;
Williams v. *New York*, 337 U. S. 241, 243.

Statement of the Grounds upon Which It Is Contended the Questions Involved Are Substantial

The hearings before the Commission (P. S. C. Case No. 12455) were concluded on December 2, 1948, and the case was accordingly "closed" on the record by the presiding Commissioner (fol. 18335). Undoubtedly, the record at that time, which comprised about 8,500 pages of testimony and approximately 400 exhibits, was such as to enable the Commission to fix fair and reasonable permanent rates.

However, the Commission, asserting that it would take "several months" for it to "dispose of" or "settle" the

controverted "claims" and "questions" as to depreciation and other factors in fixing final rates, resorted to the device of fixing temporary rates. These rates were made under Section 114 of the New York Public Service Law, which empowers the Commission to require public utilities to maintain continuing property records and books, accounts and records showing the original cost of physical property and reserves for retirements and replacements, and further empowers the Commission, in a proceeding "involving the reasonableness of the rates of any public utility," to "immediately fix" temporary rates to be charged by a utility company pending the final determination of the rate proceeding. The statute requires that the temporary rates "shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service." Under the concluding paragraph of the statute, sometimes referred to as the "recoupment" provision, the Commission is authorized "to consider the effect" of the temporary rates in prescribing final rates.

It is the appellant's contention that the procedure pursued by the Commission in determining temporary rates for appellant and the confiscatory effect of those rates upon the appellant's property are such as to render unconstitutional, under Section 1 of Amendment XIV to the Federal Constitution, the Commission's Order and Section 114 under which it was made. The constitutional issues thus presented and the grounds upon which their substantial nature is predicated are set forth as follows:

I. In arriving at a rate base under Section 114, the Commission deducted from the amount of the original cost of the appellant's physical property, as shown by the duly verified reports made by the appellant to the Commission

and the books, accounts and records kept by the appellant, an "estimated" amount of $256,058,055 for accrued depreciation (fols. 214-215). This "estimated" amount for accrued depreciation exceeded by $95,500,000 the actual amount of accrued depreciation shown by the duly verified reports made by the appellant to the Commission and its books, accounts and records kept in accordance with Sections 66 and 114 of the Public Service Law (fols. 192-195; 95-97).

The Commission's opinion affirmatively shows that such "estimate" of accrued depreciation in no way represented the result of a consideration and weighing of the conflicting evidence presented by the appellant's witnesses and the Commission's witness on the element of depreciation as a "loss in value." According to the approved memorandum of the Commission, a fair consideration and analysis of the conflicting evidence before it, including that related to the element of depreciation, would have taken "many weeks and probably several months" (fols. 167, 176, 197). Nevertheless, the Commission adopted and used, in calculating the amount of the drastic rate reduction ordered by it, the severely disputed testimony of a single Commission witness.

This arbitrary course of procedure, in which the Commission chose from the mass of controversial evidence the testimony of a single witness, without making any finding upon the evidence, without considering opposing evidence, and without setting forth the reasons and factual grounds for its choice, denied to the appellant the procedural due process of law guaranteed under Section 1 of Amendment XIV to the Constitution of the United States.

The Chicago Junction Case, 264 U. S. 258, 265;
Southern Ry. Co. v. *Virginia,* 290 U. S. 190, 198;
Morgan v. *United States,* 298 U. S. 468, 480;
Ohio Bell Telephone Co. v. *Commission,* 301 U. S. 292, 305;

Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394;
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

II. In determining the electric operating expenses and operating income of the appellant for the base annual period used by the Commission in prescribing temporary rates under Section 114, the Commission similarly deducted from the amount of annual depreciation expense, and added to the amount of annual income from electric operations, as shown by the appellant's duly verified reports and books, an amount of $2,278,888 (fol. 202).

The evidence before the Commission, however, established that the amount of annual depreciation expense so charged and shown on the appellant's books, accounts and records, had been dictated by orders issued by the Commission itself in 1947, in connection with the Commission's authorization to the appellant for the issuance of securities (fols. 118-121, 16031-032).

The Commission's action, in the face of this evidence, in choosing the opinion testimony of a single witness, without considering and weighing opposing evidence, without making findings on the evidence before it, and without setting forth the reasons and factual grounds of its choice, constitutes a denial of procedural due process guaranteed to the appellant under the Constitution.

The Chicago Junction Case, 264 U. S. 258, 265;
Morgan v. *United States*, 298 U. S. 468, 480;
Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394.

III. When the Commission undertook to prescribe temporary rates under Section 114 of the New York Public Service Law, the uncontradicted evidence in the record before it was

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that the experienced cost of capital to the appellant, as of June 30, 1948, was 6.24 per cent (Exs. 369, 370; fols. 17700-715), and that the appellant required such rate of return in order to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract necessary capital. In complete disregard of this evidence, and although Section 114 provided for a five per cent return upon original cost less depreciation only as a minimum below which the Commission could not go, the Commission's Order prescribed temporary rates computed so as to provide no more than a return of five per cent upon the rate base arbitrarily adopted by it as aforesaid.

The procedure adopted by the Commission, of prescribing temporary rates without considering and weighing the evidence before it on the subject of rate of return, without denying or contradicting the probative force of such evidence, and without making a single finding as to a reasonable rate of return to be provided by the temporary rates, constitutes a denial to the appellant of procedural due process of law.

The Chicago Junction Case, 264 U. S. 258, 265;

Southern Ry. Co. v. *Virginia*, 290 U. S. 190, 198;

Morgan v. *United States*, 298 U. S. 468, 480;

Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 305;

Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394;

Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

IV. The Commission's Order prescribing temporary rates, upon a rate base which was reduced $95,500,000 by the Commission's arbitrary "estimate" of accrued depreciation (fols. 95-97, 192-195), and upon the basis of operat-

ing expenses from which it arbitrarily excluded $2,278,881 for annual depreciation expenses charged in compliance with the Commission's orders made in connection with the issuance of securities (fols. 118-121, 16031-032), and which failed to give full effect to wage increases made by the appellant for the calendar year 1948 (fols. 14225-241; Ex. 310) or any effect to anticipated wage increases for the calendar year 1949 (fols. 18330-334) and was calculated to provide a return of no more than five per cent upon such rate base, in the face of uncontradicted evidence that the appellant required a return of 6.24 per cent to insure its credit and to attract necessary capital, and which in fact provided a return for the base year ($30,261,000—fol. 102) of only 4.38 per cent upon the originl cost less depreciation per books of account of the physical property used and useful in the appellant's electric service ($691,500,000, inclusive of Construction Work in Progress but exclusive of non-physical property—fols. 193-195, 214-216), results in the confiscation of appellant's property without due process of law and the denial to it of the equal protection of the laws.

Bluefield Water Works Co. v. *Public Service Commission,* 262 U. S. 679;

Federal Power Commission v. *Hope Natural Gas Company,* 320 U. S. 591.

V. As construed by the Court of Appeals, Section 114, which thus enables the Commission to prescribe, for an indefinite period, temporary rates upon a rate base and rate of return adopted by it as a matter of administrative fiat, without considering and weighing relevant evidence, without making findings thereon, and without disclosing the reasons and factual grounds underlying its determination, constitutes a grant of unlimited and unfettered discretion

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and a delegation of arbitrary power, in violation of Section 1 of Amendment XIV to the Constitution.

Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91;
Wichita R. R. v. *Public Utilities Commission*, 260 U. S. 48, 58-59;
Panama Refining Co. v. *Ryan*, 293 U. S. 388;
Schechter Corp. v. *United States*, 295 U. S. 495.

VI. The provision in Section 114, authorizing the commission, in prescribing final electric rates, to allow the appellant to recoup "losses" suffered from temporary rates, is not a sufficiently adequate, certain or convenient protection to the appellant to warrant the imposition, without according to the appellant procedural due process, of confiscatory temporary rates to be charged for an indefinite period of time, and operates to deprive the appellant of its property without due process of law and to deny to it the equal protection of the laws.

Joslin Company v. *Providence*, 262 U. S. 668, 677, 678;
Oklahoma Gas Company v. *Russell*, 261 U. S. 290, 293;
West Ohio Gas Co. v. *Commission*, 294 U. S. 79, 83;
West v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671.

VII. As presently construed, the laws of the State of New York do not afford any effective judicial review of temporary rates prescribed under Section 114 (See *Staten Island Edison Corpn.* v. *Maltbie*, 267 App. Div. 72, aff'd 292 N. Y. 641, dismissing equity action against temporary rates; *County Transportation Co.* v. *Maltbie*, 273 App. Div. 437, in equity action against final rates identical with temporary rates, granting injunction pendente lite against final rates but denying injunction pendente lite against temporary rates). This denial of all effective judicial re-

view of the Commission's Order prescribing temporary rates operates to deprive the appellant of its property without due process of law and to deny to it the equal protection of the laws.

Chicago, M. & St. P. Railway Co. v. *Minnesota,* 134 U. S. 418.

Conclusion

We respectfully submit that this Court has jurisdiction of this appeal.

Dated: New York, N. Y., April 11, 1950.

WHITMAN, RANSON, COULSON & GOETZ,
Attorneys for Appellant;
JACOB H. GOETZ,
RICHARD JOYCE SMITH,
Of Counsel.

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EXHIBIT A

Commission's Order of December 30, 1948, prescribing temporary rates.

STATE OF NEW YORK, PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 30, 1948.

Commissioners present: Milo R. Maltbie, Chairman; Neal Brewster, George A. Arkwright, Spencer B. Eddy.

Case 12455—Proceeding on motion of the Commision as to the rates and charges of Consolidated Edison Company of New York, Inc. for electric service.

• • • • • • •

This Commission having by order adopted May 29, 1946 instituted an investigation to determine whether the rates, charges, classifications of service and regulations of Consolidated Edison Company of New York, Inc. are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law and, if so found, to fix and establish just, reasonable and proper rates, charges, classifications of service and regulations, and public hearings after due notice having been held and the Commission having determined that the public interest requires a change in certain of the rates and charges of Consolidated Edison Company of New York, Inc. as immediate, reasonable temporary rates to be charged by the said company pending the final determination of this proceeding and having further determined that the temporary rates herein fixed and prescribed are sufficient to provide a return of not less than 5 per cent upon the original cost less accrued depreciation of the physical property of the said corporation used and useful in the public service, it is ordered:

1. That the following rates and charges be and they hereby are fixed, determined and prescribed as temporary rates to be charged by Consolidated Edison Company of New York,

Inc. on and after January 10, 1949 pending the final determination of this proceeding.

A. The total charges made to every consumer for electric service as computed under the rates and charges set forth in Service Classifications Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of its tariff P.S.C. No. 4—Electricity, are hereby reduced by 10 per cent.

B. The reductions herein directed are not to be applied to the increases or decreases resulting from the application of the fuel adjustment clause of the company's filed tariff schedules.

2. That Consolidated Edison Company of New York, Inc. be and it hereby is directed to establish on or before January 10, 1949 by tariff schedules filed on not less than 1 day's notice to the public and this Commission the rates and charges hereinbefore fixed, determined and prescribed.

3. That Consolidated Edison Company of New York, Inc. be and it hereby is directed to place on each bill for electric service computed on the basis of the rates and charges herein fixed, determined and prescribed the following notation:

> "Temporary 10 per cent reduction (exclusive of fuel surcharge) by order of the Public Service Commission dated December 30, 1948."

4. That Consolidated Edison Company of New York, Inc. be and it hereby is relieved of newspaper publication of the changes in rates and charges herein directed.

5. That within 5 days from the receipt of a certified copy of this order, Consolidated Edison Company of New York, Inc. shall notify this Commission in writing whether the terms, conditions and requirements of this order are accepted and will be obeyed.

By the Commission.

(Signed) MURRAY G. TANNER,
Secretary.

[SEAL]

FCB:FS.

STATE OF NEW YORK,
Public Service Commission, ss:

I have compared the preceding copy with the original Order of the Commission dated December 30, 1948, in Case 12455—Proceeding on motion of the Commission as to the rates and charges of Consolidated Edison Company of New York, Inc. for electric service, on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of the Public Service Commission, at the city of New York, this 30th day of December one thousand nine hundred forty eight.

——— ———,
Executive Secretary.

EXHIBIT B

Memorandum approved by the Commission in support of its temporary rate order of December 30, 1948.

STATE OF NEW YORK, PUBLIC SERVICE COMMISSION

Case 12455—Proceeding on motion of the Commission as to the rates and charges of Consolidated Edison Company of New York, Inc., for electric service.

APPEARANCES:

Philip Halpern, Counsel and Sherman C. Ward, Acting Counsel (by Frank C. Bowers and Raymond J. McVeigh, Assistant Counsel), for the Public Service Commission.

Whitman, Ranson, Coulson & Goetz (By Jacob H. Goetz, Cameron F. Mac Rae, Henry F. Lippitt, II and Robert G. Miller), 40 Wall Street, New York, N. Y., Attorneys for Consolidated Edison Company of New York, Inc.

John J. Bennett, Charles E. Murphy and John P. McGrath, Corporation Counsel (by Charles F. Preusse, First Assistant Corporation Counsel, Andrew J. Bellanca, John J. Dorsey and Arthur J. Goldsmith, Assistant Corpora-

tion Counsels, John Suglia, Associate Assistant, Corporation Counsel, and W. G. Read, Engineer), City Hall, New York, N. Y. for the City of New York.

S. Palmer, Vice-President, and M. Palmer, Engineer Interboro Electric Light & Power Company, 10 East 43rd Street, New York, N. Y.

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Paul A. Fino (by Harold J. Robbins), 391 East 149th Street, Attorney for eleven commercial and residential property owners.

W. B. Talbot, 303 East 20th Street, New York, N. Y. in behalf of Greater New York Hospital Association.

Morris Feinstein, 1745 Caton Avenue, Brooklyn 26, N. Y. in behalf of Emerick Gross, 1812 Fulton Street, Brooklyn, N. Y., consumer.

Irving Smith, Jr., 110 William Street, New York, N. Y., in behalf of Automatic Fire Alarm Company and Consolidated Fire Alarm Company, Consumers.

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Herbert Hoffman, 89 Heywood Street, Brooklyn, N. Y., in behalf of Continental Baking Company, Consumer.

E. Turk, 120 Broadway, New York, N. Y., in behalf of Midland Park Property Owners' Association, Consumer.

Harry M. Wyretzen, 2245 Bedford Avenue, Brooklyn, N. Y., in behalf of Flatbush Boys' Club, Consumer.

C. P. Benneche, 205 East 42nd Street, New York, N. Y., associated with J. K. Blum, Consultant Engineer to the Federation of Jewish Philanthropies, Consumer.

Leopold Friedman (by Gilbert Walenstein), 1540 Broadway, New York, N. Y., in behalf of Hospital for Joint Diseases, Consumer.

William McAdoo, Jr., 79th Place and 71st Avenue, Glendale, N. Y. in behalf of Sawdust Sales Company, Consumer.

Proskauer, Rose, Goetz and Mendelsohn (by P. W. Haberman, Jr.), 11 Broadway, New York, N. Y., attorneys for Mount Sinai Hospital.

John H. Hayes, Lenox Hill Hospital, New York, N. Y., President of American Hospital Association in behalf of Greater New York Hospital Association.

Brown, Wheelock, Harris, Stevens Inc. (by Lewis M. Mauger), 14 East 47th Street, New York, N. Y., agents in behalf of several properties and consumers, including Central Hanover, 542 Fifth Avenue, New York, N. Y.

Francis Poret, 16 Court Street, Brooklyn, N. Y., in behalf of 8801 Shore Road Building Corporation.

Jacob Schader, 377 Broadway, New York, N. Y., attorney for Jefferson Properties, Inc. Consumer.

J. A. C. Jansen, Assistant to President, General Dry Cleaners Inc., 217 Russell St., Brooklyn 22, N. Y., Consumer.

Garey, Desvernine and Garey (by William Helfer), 63 Wall Street, New York, N. Y., Attorneys, and Philip F. Harling, Assistant to President, for the Brooklyn Fox Corporation, 1501 Broadway, New York, N. Y., Consumer.

Horace S. Ely & Company (by T. A. Taylor), 76 William Street, New York, N. Y., Agents in behalf of United Charities Buildings, East River Savings Bank and Continental Casualty Company, Consumers.

Irving Broun, President, Fred F. French Companies, 551 Fifth Avenue, New York, N. Y., Consumers.

Szold, Brandwen & Shubert (by Irving Michael Atkin), 30 Broad Street, New York 4, N. Y., Attorneys for Amalgamated Dwellings Inc. and Amalgamated Housing Corp.

Herman Stichman, Commissioner of Housing (by Herman Cohen, Counsel) of Division of Housing of the State of New York.

Harold J. Treanor and Morway Picket (by Paul Green, 285 Madison Avenue, New York City), 12 East 41st Street, New York, N. Y., Attorneys, and Caesar Nobiletti, 25 Broad Street, New York, N. Y., Chairman, Combined Public Utilities Committee, for the Real Estate Board of New York, Inc. and Midtown Realty Owners Association, Inc.

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Frank W. Chambers, 60 Broadway, New York, N. Y., Attorney for Trustees of Sailor's Snug Harbor and Spingler Van Buren Estates, Inc.

Charles A. Rathkopf, 271 Merrick Road, Lynbrook, N. Y., Counsel for Village of Lynbrook.

John J. Kirby, Attorney, and Byron E. Harding, Seventh and D Streets, SW., Washington, D. C., for Bureau of Federal Supply, U. S. Treasury Department.

Paul R. Young, 103 Washington Avenue, Albany, N. Y., Co-ordinator of Utility Contracts, State of New York, Executive Department, Division of Standards and Purchase.

Ignatius Castelli, 217 Broadway, New York, N. Y., Attorney for United Civic Association of Bronx and Pelham Bay Taxpayers Association.

Lesser and Lesser (by Harry Lesser), 55 W. 42nd Street, New York, N. Y., Attorneys for Williamsbridge Taxpayers Association, Wakefield Taxpayers and Civic League, Inc., Bathgate Taxpayers Association, Cranford Taxpayers Association and Ewald Taxpayers Association of the Bronx.

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Walter B. Caughlan, Jr., 111-8th Avenue, New York, N. Y., Senior Attorney for Port of New York Authority.
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* * * * * *

MALTBIE, Chairman:

This is a proceeding to determine the reasonableness of all of the rates and charges of the Consolidated Edison Company of New York, Inc. for all classes of electric service, including not only that rendered to general consumers but to departments of the United States government, the State of New York, and the City of New York, and the reasonableness of purchase and exchange agreements with certain other utilities. It was initiated by the Commission because no determination had ever been made as a result of a comprehensive survey of property, revenues and expenses, because it was frequently asserted by various interested parties that they were being overcharged and because comparisons between the rates of consolidated Edison and the rates charged in other cities and areas were often made.

The first hearing was held upon June 28, 1946 and the last upon December 2, 1948. Over 8,500 pages of testimony have been taken and about 400 exhibits received in evidence. Many of these exhibits are voluminous and several exceed 50 pages in number. Merely to digest the voluminous record and present the numerous questions to be decided before a whole rate schedule can be framed will take many weeks and probably several months.

In view of these facts, should the Commission undertake to exercise the authority conferred upon it by Section 114 of the Public Service Law and fix temporary rates to be operative until all of the issues in this proceeding can finally be determined?

In a brief submitted by counsel for the utility, dated December 6, 1948, it is urged as a reason why no temporary rate should be fixed that electric rate reductions aggregating more than $15,000,000 on an annual basis have been made by the company between November 1, 1945 and September 7, 1946, of which about one-half were made in 1946.

If nothing further were to happen, as a result of this proceeding, these reductions establish beyond peradventure the great need for the investigation and justify the claims so frequently made that the electric rates of the company were excessive. We shall not stop to discuss the application of *post hoc propter hoc,* but subsequent events have certainly justified the initiation of the proceeding.

The question now before the Commission is not the apportionment of credit for reductions of over $15,000,000 but whether electric customers of the Consolidated Edison are entitled to reduced rates while the extensive analysis and the many determinations above referred to are being made. That the Commission has power to do so is clear and it is noticeable that company counsel do not attempt to cite any facts from the record to indicate that a further reduction is not urgently needed. As will appear, the company is earning upon the basis specified in the Temporary Rates Law (Section 114) in excess of a fair return upon its electric property. Further, counsel concedes that if the rate schedule which it proposes were placed in operation, its revenues would be increased by approximately $2,800,000, without any allowance for growth of the business. It would be an unjustified disregard of the provisions of a law passed to deal with exactly such a situation if this Commission were to refuse to analyze the facts of record and decide now the matter would not even be considered.

Let us review a few of the high lights of this proceeding. In the early stages, it quickly appeared that the Consolidated Edison had never made any thorough analysis of the cost of service to any class of customers or to any of the blocks of consumptions in any rate classification. Rate changes were made from time to time, apparently to satisfy certain interests and certain complainants, often based upon what the traffic would bear or to prevent the construction of private plants to supply individual buildings or buildings immediately adjacent. Whether by so doing the company had placed an additional burden upon general consumers who were obviously without means to provide or secure electric service from other sources was a factor given little or no consideration.

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In certain instances, the company took on additional customers and charged therefor merely an "increment cost" following the principle that the last considerable group of customers or the last public utility supplied should pay only the *additional costs* which such service imposed without any contribution to the general costs incurred. This is a plan which this Commission has held to be no measure of reasonable charges and is the one which is causing untold trouble at present because charges for commutation service were originally fixed on this basis and commutation business has grown to such a great degree that the railroads cannot stand the burden which the plan unjustly imposes upon other customers.

Representatives of the federal government have presented testimony purporting to show that the rates which the company proposes to apply to federal departments in the State of New York are excessive.

The City of New York belatedly has presented testimony and is contending that nearly a million dollars should be eliminated from the figures submitted by the company in view of the terms of a contract between the City of New York and a conduit company. The rates for municipal service have never been fixed by the Public Service Commission. It is clear that street lighting is in a special class and deserves separate consideration.

The staff of the Commission has presented a large amount of testimony attempting to establish by their analyses the fundamental considerations which should determine reasonable rates. In many instances, the results presented are greatly divergent from the conclusions which the Consolidated Edison witnesses have endeavored to maintain.

Another factor in this proceeding which might be mentioned is the attempt by Consolidated Edison to restrict submetering, that is, the purchase of electric energy by landlords or others at wholesale and to be resold at retail. The representatives of large business interests claim that they were induced to enter the submetering business by the company itself and that the rates which have been established to secure this business should not be altered when the establishment of private plants has become difficult and even impracticable in some instances.

To settle all of these questions will, as already stated, require several months as it is incumbent upon the Commission to make a careful analysis of the facts and if possible to establish a basic rate structure adjusted to present conditions.

There is also before the Commission, a proceeding (Case 13423) in which the Consolidated Edison is requesting a considerable increase in gas rates due to the fact that in recent years wages have been greatly increased and the costs of materials used in the production of gas and maintenance of the property have also largely risen. The company has proposed a gas rate schedule which it estimates would increase its revenues upon the basis of 1948 sales to the extent of about $11,500,000. The testimony presented in this proceeding is to be reported to the Commission in a separate memorandum and is referred to here merely to present the complete picture and to note the relationship of the electric and gas departments and the combined effect upon the company as a whole.

Consolidated Edison is urging upon the Commission the need for an immediate gas rate decision, claiming that these rates should be increased *at once*. Upon the other hand, it is insisting that there should be no reduction in electric rates under the Temporary Rates Law. It maintains that the fixation of gas rates should not await the determination of a complete case, and inferentially that the Commission should not spend two and a half years in order to have a complete gas record and a final gas rate determined. Counsel apparently do not appreciate the incongruity of their claim that gas rates be increased at once because they are too low and that electric rates should stay as they are even though they may be too high.

It has been suggested upon behalf of gas consumers that the company is making more than a fair return from its gas and electric business and that gas rates should not be increased as long as the gas and electric businesses combined yield an adequate return.

The law is clear upon this point. The Court of Appeals held nearly thirty years ago that the rates of electric service and the rates for gas service must be determined each upon its own basis and that is is illegal to use the

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excess earnings from one class of service or from one department to offset a deficiency in earnings from another utility service or from another department (*Municipal Gas Company* v. *Public Service Commission*, 225 New York 89). Counsel for the Edison Company suggest in their brief that this decision is an "anachronism in the light of the present state of the art of rendering electric, gas and steam services by a combination company", attempting thereby to prevent any application of that decision to the present situation.

However, there are many decisions of the United States Supreme Court to the same effect which might be cited. Indeed, the principle has been carried further than stated above and it is established that a rate upon a commodity or a rate for a class of service must be reasonable per se and not justified merely because the company's earnings as a whole are satisfactory. If company counsel are right, why are they before this Commission in the gas case asking that the company's revenues be increased $11,500,000 when as will appear the revenues from the gas and electric departments combined are more than adequate?

As the decisions of the courts clearly indicate, it is the duty of this Commission to reduce or increase the rates of one kind of utility service regardless of the need for reduction or increase in rates in another class of service even though supplied by the same corporation.*

Now let us look at the facts of record and first as to revenues, expenses and income as reported to the Commission.

Reported Electric Operating Income

The reported operating income of the electric department for the calendar year 1947 and the fiscal year ended Septem-

* It is unnecessary here to discuss whether or not the decisions of the courts are sound, but it may be pointed out that if combined results were the test of reasonableness, it is obvious that in a given area where gas is supplied by a company rendering combined service, the gas rates would under existing conditions be very much lower than in an immediately adjacent area operating under exactly similar conditions where a company supplies *only* gas service and therefore is unable to offset its losses by recourse to a profitable electric department.

ber 30, 1948, compiled from the company's annual quarterly reports on file with the Commission is set forth in Table 1. The figures for the year ended September 30, 1948 are the latest available. The operating income before income taxes for this twelve month period was nearly $62,700,000 and about $46,700,000 after deduction of income taxes. The former is nearly $7,000,000 in excess of that for 1947, while the latter is only about $2,500,000 more

Table 1. Reported Electric Operating Income, 1947–1948

	Twelve Months Ended September 30, 1948	December 31, 1947
Sales of electric energy	$266,880,726.88	$246,278,550.72
Other revenues	2,869,861.75	2,797,686.63
Total operating revenues	$269,750,588.63	$249,076,237.35
Production	$ 84,579,518.06	$ 73,525,233.71
Transmission	382,560.68	274,328.57
Distribution	29,596,424.42	28,545,641.12
Customers' accounting and collecting	10,947,711.80	10,545,889.71
Sales promotion	4,478,013.52	4,496,982.24
Administrative and general	17,409,843.84	17,944,257.18
Depreciation	22,795,888.71	22,656,523.59
Operating taxes	36,872,217.50	35,231,605.74
Total revenue deductions	$207,062,178.53	$193,220,461.86
Operating income before income taxes	$ 62,688,410.10	$ 55,855,775.49
Federal income tax	15,960,000.00	11,600,000.00
Operating income after income tax	$ 46,728,410.10	$ 44,255,775.49
Kilowatt hours sold	9,536,506,711	9,010,647,800
Cents per kilowatt hour sold	2.80	2.75

due to the effect of large taxable deductions available from the refinancing program and used in computing the income tax for 1947.

It will be noted from the table that the reported revenues from the sales of electric energy during the year ended September 30, 1948 were $266,880,726.88—the highest for any twelve-month period in the history of the Consolidated Edison Company as it is now or on a consolidated basis prior to July 31, 1945. They exceed the revenues

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from the same source during 1947 by over $20,600,000 or 8.4 per cent.

An increase of this magnitude is very striking, particularly when one notes that these additional revenues were provided by low consumption customers paying higher average rates. The company sold 9,536,506,711 kwhrs. of energy during the year ended September 30, 1948 as compared with 9,010,647,800 kwhrs. in 1947, an increase of 5.8 per cent compared with an increase of 8.4 per cent in revenues. As a result, the average revenue per kwhr. increased from 2.73 cents in 1947 to 2.80 cents for the year ended September 30, 1948.

The reported revenue deductions, including depreciation expenses and operating taxes, for the year ended September 30, 1948 were about $207,000,000—nearly $14,000,000 higher than the same charges in 1947. The tabulation shows that over $11,000,000 of this increase appeared in production expense. It is principally accounted for by the increases in fuel prices and wages. The additional kilowatt hours generated would also be responsible for some portion of the increase. The remaining $3,000,000 of the increase is spread over the other expense groups with one-half of the amount appearing in operating taxes.

Accruals for federal income taxes were $4,360,000 greater in the fiscal year ended September 30, 1948 than in the calendar year 1947, obviously in part because the operating income during the former period was higher than in the latter, but the refinancing program in 1947 provided taxable reductions that saved the company $3,840,000 of income taxes in that year.

No adjustment of any of the figures reported by the company has been made in either period. But the staff of the Commission has challenged the propriety of many items upon the ground that they are abnormal or nonrecurring, improperly includible in costs to be paid by consumers or excessive in amount even if some reasonable amount should be allowed. None of these items is considered or ruled upon at this time; they are left for determination in final rates.

Rate Base Based on Book Figures

In order to ascertain what rate of return the electric department earned during the year ended September 30, 1948, a rate base for the property devoted to electric operations must be found. Using the reported book cost of property, book depreciation reserves and an estimate for working capital, an average rate base for the year would not exceed $662,500,000 as shown in Table 2.

During the course of the hearings in this proceeding, a number of contentions were advanced with respect to the book cost of the company's electric property which if allowed would have a significant effect in reducing the balances used in computing this rate base. A few of the more important claims relate to the excess of $17,000,000 allegedly included in the book cost of the East River generating station, large theoretical administrative and general expenses that were capitalized and included in the plant account balances since 1935, the apparently excessive proportion of common property assigned to the electric department and the used and useful character of a large amount of underground property.

In addition, the Commission staff claimed a very large deficiency in the book depreciation reserve relating to the electric property. While all of these and many other claims must be disposed of in fixing final rates, no adjustment has been reflected in Table 2 for any of these items. The figures there shown are the unmodified book figures as well as the company's full claim with respect to the proportion (85 per cent) of common property assignable to electric operations.

Certain items appear in Table 2 which are not usually found in a rate base compilation, due principally to the fact that the book amounts shown are as of September 30

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Table 2. Estimated Rate Base, Year Ending September 30, 1948
(All Company Figures Except Working Capital)

	September 30, 1947	September 30, 1948	Average
Electric plant in service	$699,969,904.42	$734,541,722.79	$717,255,813.60
Common utility plant (85 per cent)	47,110,231.22	49,628,974.15	48,369,602.68
Total plant in service	$747,080,135.64	$784,170,696.94	$765,625,416.28
Deduct:			
Reserve for depreciation of plant:			
Electric	$136,559,699.58	$150,163,540.79	$143,361,620.18
Common (85 per cent)	10,237,782.61	11,461,518.27	10,849,650.44
Other deferred credits:			
Electric	452,297.55	1,500,000.00	976,148.77
Retirement work in progress—debits:			
Electric	1,619,400.13	2,546,509.77	2,082,954.95
Common (85 per cent)	14,329.83	20,493.76	17,411.79
Total adjusted reserve for depreciation	$145,616,049.78	$160,558,055.53	$153,087,052.65
Book cost less reserve for depreciation	$601,464,085.86	$623,612,641.41	$612,538,363.63
Contributions in aid of construction	.....	61,114.79	30,557.39
	$601,464,085.86	$623,551,526.62	$612,507,806.24
Add:			
Estimating working capital			50,000,000.00
Total rate base			$662,507,806.24
Use			$662,500,000.00

rather than at the year end. As retirement work in progress balances are not closed out until the end of the year by debits to depreciation reserves, they should be deducted here to show a true picture. Certain deferred credits are also shown in Table 2 as they represent items that will ultimately be credited to the depreciation reserves and consequently have been so treated in this rate base calculation.

The only amount appearing on this table that is not a book figure is the estimate of working capital. The amount included is $7,500,000 less than the company's estimate for the calendar year 1947 which was submitted in the present proceeding (Exh. 335). The company's estimate

included a patently excessive figure for cash which purported to represent the additional cash needed by the electric department over and beyond its average working capital requirements for all other elements. Attention should also be called to the fact that the company's estimate for working capital reflects not only the average amount of fuel and other materials and supplies on hand but it also has been increased by a theoretical amount of over $6,500,000 said to be needed to bring the fuel stock on hand at the end of 1947 up to a purportedly required total of 1,500,000 gross tons of coal or its equivalent. Thus it will be seen that an allowance of $50,000,000 is a liberal estimate for the period.

Comparing the reported operating income of $46,728,410.10 for the year ended September 30, 1948 with the average rate base of $662,500,000 for the same period indicates the electric department earned a return of slightly over 7 per cent.

Adjustments to Book Figures

Reported book figures without modification are not the proper basis for determining temporary rates. Engineers of the Commission testified that the book depreciation reserve is deficient to the extent of about $96,500,000. Adjusting the rate base shown in Table 2 for this one factor alone would produce $566,000,000 as the average rate base for the year ended September 30, 1948.

A parallel correction must of course be made in the operating income to reflect the annual depreciation expenses consistent with the adjusted accrued depreciation. The engineers of the Commission estimated that an annual charge of $20,517,000 for the same period (year ended September 30, 1948) should be used instead of $22,795,888.71 charged by the company against electric operations. This would increase electric operating income by $2,278,888.71, producing $49,007,298.81.

As the Commission has stated repeatedly and as clearly indicated in the decision of the United States Supreme Court in the Chicago Telephone case (*Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151), the determination of

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accrued depreciation and the amount to be included in operating expenses to build up a depreciation reserve must be consistent. Any party to a rate proceeding who contends that accrued depreciation may be determined according to one theory (such as limiting accrued depreciation to what an observer with poor eyesight can detect) and a reserve created by charges to operating expenses upon another basis (such as straight-line) has mental strabismus.

Credit has been claimed for the Consolidated Edison Company because it has built up a reserve, which not many years ago was less than 10 per cent of the book cost of the depreciable property, to about 20 per cent of the book cost of all property through charges to operating expenses. Probably credit should be given to the management for increasing the reserve even though it is still deficient, but the attempt to make present and future electric consumers bear the deficiency which should have been provided for long ago is inequitable and should not be recognized in fixing present rates. All differences of opinion as to the inadequacy of depreciation reserves could have been settled long ago had the Commission yielded to the argument that the deficiencies should be met by charging amounts to operating expenses far in excess of the rate at which depreciation is currently accruing.

As indicated above, the company included in electric operating expenses during the year ended September 30, 1948, $22,795,889, which is in excess of the amount which Mr. Goldthwaite's testimony fixed as the current rate at which depreciation is accruing by about $2,279,000. This difference is merely an attempt to make 1947-8 consumers provide the funds to build up the depreciation reserve beyond what they should be called upon to contribute.

In this memorandum the principles followed by the Commission in other rate and security cases have been followed.

While a comparison of the modified rate base with the adjusted operating income for the year ended September 30, 1948 might be made, it would be misleading so far as being a guide to action by the Commission. In arriving at the reported operating income, the company deducted $15,960,000 for federal income taxes. This amount is depressed by abnormal income deductions brought about

by the company's refinancing program in 1947 and reported losses in the gas department and its nonutility operations.

If such factors were eliminated and the taxable income of the electric department alone used in estimating the accruals for income tax purposes, the reported income tax charges of $15,960,000 would be increased to about $20,000,000. Upon this basis, the reported operating income would be reduced by $4,040,000 and the previously indicated income of $49,007,298.81 would be modified to nearly $45,000,000. This latter figure more nearly reflects the real income of the electric department for the year under study and represents a return of almost 8 per cent on the rate base of $566,000,000.

Under Section 114 of the Public Service Law, the Commission is empowered to fix temporary rates which will permit the company to earn not less than 5 per cent on the original cost of its property used and useful in the rendition of service less accrued depreciation. A 5 per cent return on a rate base of $566,000,000 is $28,300,000 and operating income of $45,000,000 would be excessive by over $16,000,000. If a 5½ per cent return were used, the excess would be nearly $14,000,000.

Regarding the method used above in arriving at the excess operating income after income taxes, attention may be called to the basis upon which the Consolidated Edison is asking for an increase in gas rates to the extent of $11,500,000 annually. The rate base there submitted by the company was the book cost of the gas property used and useful in the service of the public, less accrued depreciation purported to be according to testimony given by Mr. Goldthwaite, which is upon the same basis as that presented by him and used in this case. To the amount thus obtained, the company added their estimate of working capital and then showed that the rates which they proposed would, according to their computations, yield about 5 per cent upon such rate base. Consistent therewith *in that case*, the company used in its operating expenses the annual depreciation amount suggested by Mr. Goldthwaite, thus conforming to the same standard of consistency that the Commission has insisted as proper wherever depreciation, accrued and annual, is a factor. If this is a good standard in a case

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involving interim gas rate increases, why is it not a proper standard in a case involving temporary electric rate reductions?

Temporary Rates Standard

The Temporary Rates Law presents a somewhat different method of computing a rate base and to conform to that standard, Table 3 has been prepared to show the situation as of September 30, 1948. The only substantial difference between this table and the figures already presented is that the balance in the materials and supplies account at the end of this year has been substituted for working capital, the standard in the Temporary Rates Law being the original cost of property less the accrued depreciation. This would call for electric plant used and useful in the service of the public (Account 101) plus materials and supplies (Account 131) less accrued depreciation, which so far as this case is concerned is limited to Account 101.

The resultant figure rounded off is $558,000,000. If construction work in progress, including 85 per cent of common utility plant, were added of nearly $38,000,000, the total

Table 3. Estimated Rate Base, September 30, 1948

Electric plant in service	$734,541,722.79
Common utility plant in service (85 per cent)	49,628,974.15
Total plant in service	$784,170,696.94
Deduct:	
Reserve for depreciation of plant	
Electric	$150,163,540.79
Common (85 per cent)	11,461,518.27
Other deferred credits	1,500,000.00
Retirement work in progress—debits	
Electric	2,546,509.77
Common (85 per cent)	20,493.76
Total reserve—per books	$160,558,055.53
Deficiency in book reserve	95,500,000.00
Total adjusted depreciation	$256,058,055.53
Book cost less depreciation	$528,112,641.41
Contributions in aid of construction	61,114.79
	$528,051,526.62
Add:	
Materials and supplies	29,772,023.20
Total rate base	$557,823,549.82
Use	$558,000,000.00

would become $596,000,000 and at a 5 per cent return would call for about $30,000,000 in addition to operating expenses and all taxes. Compared with the modified income shown above of $45,000,000 indicates an excess of over $15,000,000.

Effect of Revenue and Income Taxes

At this point, a peculiar feature of the effect of income and gross earnings taxes upon rates in relation to operating income should be pointed out. In the cases in which *increased* rates have been involved, it has been contended that an increase in revenues merely to offset deficiencies below operating expenses and taxes *which have been paid* is insufficient because *increased* gross earnings and income taxes must be paid out of increased rates and do not leave a *net* increase in operating income sufficient to meet the actual charges which require the increased rates.

For example, take the case of a company which has had revenues barely sufficient to pay all operating expenses and taxes, including income and gross earnings taxes, and a fair return. If the company's operating expenses in the period for which rates are being fixed have increased $1,000,000 and rates are allowed *only* sufficient to provide additional revenues of $1,000,000, when there is deducted therefrom the gross earnings and income taxes amounting generally in a company of this size to over 40 per cent, there is left only $600,000 to apply toward increased costs of $1,000,000. In order to determine a proper amount to pay the additional taxes it is necessary to provide about $1,667,000. Then when 40 per cent has been paid, there is left about $1,000,000 which was the sum needed to provide additional costs. Thus the rates to be charged must be sufficient to increase revenues by $1,667,000.

When one comes to a case calling for *reduction* of rates, the reverse is true. If the facts show that a company had earnings of $1,000,000 in excess of a proper return after paying all of the operating expenses and taxes applicable to the period, the company can reduce rates $1,667,000, because its income and gross earnings taxes will be reduced about 40 per cent. Not having to pay earnings and income taxes of about $667,000, it will have operating income of only $1,000,000 less than it did have.

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The reasonableness of such a tax system is not before us. It may be said, however, that the Commission has repeatedly pointed out in various cases that the imposition of taxes upon utilities, whose rates are currently regulated and adjusted to produce a reasonable return, results in taxing the users of utility services. T..is is indirect taxation and when consumers pay the increased rates in a period of rising costs, they should remember that out of every dollar paid in increased rates, where the company is subject to payment of over 40 per cent in income and gross earnings taxes, 40 cents of the dollar goes not to the utility but to governmental bodies. In a period of declining rates, the converse is true and the government loses revenue because the utility has been earning excessive profits.

As the electric department of Consolidated Edison would be in the class paying 38 per cent federal income tax, 3½ per cent gross earnings tax to city and state, and 3⅓ per cent to the federal government for the electric energy tax, the total rate actually becomes 42.2 per cent. This means that if a company reduces rates, it will lose in net income only 57.8 per cent. Applying this ratio to the lowest figure produced in the above analyses of $14,000,000 would indicate possible rate reductions of some $24,200,000.

Applied to the total revenues from the sale of electric energy for the year ended September 30, 1948 (about $266,800,000), a reduction of 9 per cent could be required; but there is question whether all classes are entitled to a reduction.

In their testimony, the witnesses for the company and the staff of the Commission presented analyses and allocations to indicate to what extent the operating income of eight classes of consumers in 1946 showed an excess over operating expenses, depreciation and taxes (except federal income). Although they did not agree in amounts, they did agree that three groups had no excess, but a deficiency. These were street lighting, governmental (federal, state and city other than street lighting) and railroads. In the case of "other contracts", a small class, the company witness showed an appreciable deficiency and the staff of the Commission a small excess.

The two groups also agreed that four classes all showed excess above operating expenses, depreciation and taxes (except federal income), but differed considerably as to the amounts and percentages. These were residential (including religious), general, breadown and wholesale. The third is a small and not important class.

Although the testimony on this subject will be more fully reviewed in determining final rates, it is sufficiently clear to require the elimination of all but these four classes in any determination of temporary rates.

The grouping of service classifications and various other consumers into the eight classes referred to above is not easily identifiable with the rate schedules, but from reports filed with the Commission the total revenues for the year ended September 30, 1948, for all service classification can be obtained. It was slightly over $235,480,000. This amount excludes street lighting, sales to public authorities, other electric utilities and railroads, which in general are the classes that did not in 1946 earn operating expenses, depreciation and taxes.

The total includes over $20,000,000 attributable to the fuel surcharge established several years ago and changed from time to time as the price of fuel increases or decreases. In the costs for the year ended September 30, 1948, fuel was charged on an average cost basis, but obviously nothing was included for any increase in fuel prices in the future. As the cost of fuel increases, the fuel surcharge increases and any temporary reduction ordered at this time on a percentage basis should not affect the fuel surcharge. Whatever may be the disposition of this important matter in final rates, it is the theory of the present surcharge that the increase or decrease in the cost of fuel will be offset by an increase or decrease in rates in the form of the fuel surcharge. Assuming that the surcharge is allowed to continue under the general plan which has been operated for years, no change should now be made as the fuel surcharge will provide for changes in fuel prices.

In computing a percentage as the form of temporary rate reduction, these facts require that there be deducted from the total revenues for the classes of service considered as

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entitled to reductions the amount of the fuel surcharge levied in the year ended September 30, 1948 which somewhat exceeds $20,000,000. The revenues thereby obtained to which a reduction should be applied becomes about $215,000,000. Ten per cent of this amount is $21,500,000.

As pointed out in the previous pages, the consumption of electric energy has been increasing for many months at a considerable rate compared with the average in past years and the revenues therefrom have increased *per kilowatt hour* without any corresponding change in the rate schedules. This significant fact means that residential, industrial and commercial consumers, who have been paying the higher rates, have been increasing their consumption more than the other classes of customers who are billed under special rates. Whether this growth and this characteristic will continue is, of course, problematical, but it is a fact that there has been an increase of nearly 10 per cent in electric revenues for some time.

When considering this phase of the matter, it should be kept in mind that an appreciable reduction in the price of electricity and the very considerable increase in the price of gas will tend to accentuate the divergent trends of the two industries, to increase the use made of electricity, to decrease gas use and to make more certain that the trend in electric business will continue. Rate reductions almost invariably increase use.

There is one other important factor which may have an effect in the opposite direction. Arrangements are being made to bring natural gas to the residents of the metropolitan area. It has been informally stated that by so doing, the cost of rendering gas service to this district will be reduced by several millions of dollars and that the rates now considered necessary will decline. It is not expected that these plans will be in operation before the fall of 1950—possibly 1951—and no rates as of that date have yet been indicated by any of the gas companies.

Mention has been made of the fact that four classes of customers, not large in number but with revenues of $31,400,000 in the year ended September 30, 1948 are paying less than operating expenses, depreciation and taxes, ac-

cording to testimony by staffs of the company and the Commission. If, under a proper allocation of all elements, this should be found to be correct, the rates for these four classes should be materially increased, not only to pay the costs mentioned, but also to provide some return on the property. Assuming, for example, that such increases should amount to a *net* 10 percent, the revenues and operating income of the company would be increased $3,000,000, which is an important factor to be considered in determining final rates.

It is recommended that the Consolidated Edison Company be directed to place in effect not later than January 10, 1949, an amendment to its rate schedule providing for a decrease in rates of all service classifications, exclusive of the fuel adjustment charge, of 10 per cent to remain in effect until final rates are determined.

December 27, 1948.

Approved by the Commission Dec. 30, 1948.

EXHIBIT C

Opinion of the Appellate Division, Third Department, granting a stay of temporary rates pending the review proceeding (275 App. Div. 731)

Decided March 16, 1949

In the Matter of Consolidated Edison Company of New York, Inc., Appellant, against Milo R. Maltbie et al., Constituting the Public Service Commission of the State of New York, et al., Respondents

On December 30, 1948, the Public Service Commission made an order requiring petitioner, Consolidated Edison Company of New York, Inc., to make effective as of January 10, 1949, a temporary reduction in its filed rates for electric service to general consumers. The reduction is an "across the board" 10% reduction estimated to amount on a yearly basis to $21,500,000. On January 7, 1949, peti-

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tioner filed with the commission an application for a rehearing and for postponement of the effective date of the temporary rate, and on January 17, 1949, that application was denied. On January 17, 1949, petitioner instituted a proceeding under article 78 of the Civil Practice Act to review the commission's determination. That petition was returnable at the Albany Special Term of Supreme Court on January 26, 1949. At the same time there was returnable before the Special Term an application by petitioner for a stay of the temporary rate order pending the determination of the proceeding for review. The Special Term denied the motion for a stay and transferred the proceeding to this court for final disposition (193 Misc. 1015), and two orders carrying out these decisions were entered in the Albany County Clerk's Office on February 15, 1949. Petitioner appealed from the order denying the stay and that appeal has been argued before this court. It has also applied to this court for a stay. It appears that the order of the Public Service Commission in this proceeding will result in a reduction of the company's revenues from electric service of not less than $21,500,000 annually, and also in a reduction in operating income, for the same period, of not less than $12,427,000. It is worthy of note that the commission's final order was made, not during the hearings as to the rates to be fixed, but at the conclusion thereof at a time when the commission was in a position to have fixed permanent rates. In fixing the temporary rates the commission deducted $95,500,000 from the original cost less depreciation of the used and useful physical property of petitioner as shown on the company's books of account and in its verified reports, and $2,300,000 from the operating expense for depreciation accrual, likewise shown on the books of the company and in the reports. A serious question is presented as to whether or not the commission exceeded its statutory authority under section 114 of the Public Service Law in fixing the temporary rates. The Legislature has authorized the commission to fix temporary rates sufficient to provide a return of not less than 5% upon the original cost less accrued depreciation as shown

by the books and records of the company. It is only where such records are not available that the commission is permitted to estimate what such figures might be. In the instant case, although the facts needed have been furnished in the form required, they have been ignored by the commission to the extent that it has substituted its own estimate of the amount of depreciation based on a straight line formula for the actual figures as shown by the books of the company. If it be ultimately determined that the commission's act was *ultra vires* and void, it would seem to follow that any loss in operating income thereby incurred would constitute "great and irreparable damage" (Public Service Law, § 23, subd. 2) as a matter of law. We are informed that this loss will approximate $65,000 a day. The recoupment provisions of section 114 of the Public Service Law were designed to furnish a method whereby the permanent rates ultimately adopted might reflect the difference, if any, between such permanent rates and the temporary rates yielding 5% on the company's own figures. This difference must, by necessity, be small if the directives of the statute are adhered to. These provisions were not designed and are not adequate to meet the situation herein presented where the loss, if the order is void, may well reach astronomical figures. The very magnitude of the sums involved is also clearly indicative of the "great and irreparable damage" this petitioner may suffer, both as to reduction of current income in the face of increased operating costs and expanding facilities and as to its adverse effect on necessary company financing as disclosed by the evidence. The application for a stay *pendente lite* is granted for the reasons set forth above, and otherwise stated in the moving papers, from which it presumptively appears to the court that great and irreparable damage will otherwise result to the petitioner. The order to be entered hereon shall contain appropriate provisions as to the security to be given by the petitioner. Present—Foster, P. J., Heffernan, Brewster, Deyo and Santry, JJ.

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EXHIBIT D

Opinion of the Court of Appeals reversing the stay order (299 N. Y. 172)

Decided April 20, 1949

In the Matter of Consolidated Edison Company of New York, Inc., Rsepondent, against Milo R. Maltbie et al., Constituting the Public Service Commission of the State of New York, Appellants

Loughran, *Ch. J.*

The parties to this article 78 proceeding are the Public Service Commission of the State and Consolidated Edison Company of New York, Inc., a gas and electric corporation subject to the Public Service Law. Pursuant to section 114 of that statute, the Commission on December 30, 1948, fixed temporary rates to be charged by the company for electric service supplied to its consumers. Enforcement of that order of the Commission has been stayed by an order of the Appellate Division which is now before us for review upon the following questions certified:

"1. Does the order [for a stay] as granted contain the requisite specific findings required by subdivision 2 of section 23 of the Public Service Law to justify the stay?

"2. Do the facts found in the order as granted constitute great and irreparable damage within the meaning of those terms, as used in subdivision 2 of section 23 of the Public Service Law?"

Section 23 requires that an order suspending an order of the Commission fixing rates "shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great and irreparable damage would otherwise result to the petitioner and specifying the nature of the damage" (subd. 2). The stay in question was granted by the Appellate Division, because in

the judgment of that court there were serious questions as to whether the Commission in fixing the temporary rates had exceeded the powers conferred upon it by section 114 of the Public Service Law, and because the rate provisions of that section, as read by that court, "were not designed and are not adequate to meet the situation herein presented where the loss, if the [temporary rate] order is void, may well reach astronomical figures." (275 App. Div. 731, 732.)

The answer to these misgivings is to be found, we think, in the construction which this court put upon section 114 in *Matter of Bronx Gas & Elec. Co.* v. *Maltbie* (271 N. Y. 364, 375). Section 114, we there said, "forces the Public Service Commission to consider the returns from the temporary rate and to establish the permanent rate, or the final rate, accordingly; that is, if the temporary rate has proved to be too low the final rate must make it up to the company. Over what time it is necessary to provide a rate sufficient to make up the loss, or to include the take-up, is a matter of adjustment, machinery and method. These matters are all in the hands of the Public Service Commission, which may increase or modify a rate to meet the circumstances at any time."

The recoupment proviso of section 114 is applicable to the temporary rates here in question. Hence, "great and irreparable damage" cannot result to the company from the temporary rate order, notwithstanding the Commission made its own estimate of the depreciation of the used and useful physical property of the company instead of accepting the figures shown on the company's records. Hence, too, the magnitude of the sums that the company may be entitled to recapture does not demonstrate either the existence of "great and irreparable damage" or the inadequacy of the recoupment proviso of section 114 (see *Staten Is. Edison Corp.* v. *Maltbie*, 292 N. Y. 611).

The order should be reversed, with costs and the motion for a stay denied. The questions certified are answered in the negative.

Lewis, Conway, Desmond, Dye, Fuld and Bromley, JJ., concur.

Order reversed, etc.

EXHIBIT E

Majority and dissenting opinions of the Appellate Division, Third Department, in the review proceeding under Article 78 (275 App. Div. 475).

Decided June 28, 1949

In the Matter of Consolidated Edison Company of New York, Inc., Appellant, against Milo R. Maltbie et al., Constituting the Public Service Commision of the State of New York, et al., Respondents.

Santry, *J.* On May 29, 1946, the Public Service Commission, on its own motion, instituted a proceeding to investigate and determine whether the rates and charges of Consolidated Edison Company of New York, Inc., for electric service are unjust and unreasonable, and if so found, to fix and determine just and proper rates and charges for such service. Hearings were had and testimony taken from time to time up to the 2d day of December, 1948, when the record was closed.

On December 30, 1948, the commission made the order under review, by which it fixed and established temporary rates for electric service, effective until final rates are established, by providing for a 10% reduction across the board in the rates charged by the company on the date of the order. The company petitioned for a rehearing and a postponement of the effective date of the temporary rates, which was January 10, 1947 [sic. 1949]. The application was denied, and on January 18, 1949, the company brought this proceeding in the Supreme Court, Albany County, for a review of the commission's order and determination under article 78 of the Civil Practice Act. The proceeding was transferred by order of the Special Term to this court for disposition on the merits.

The issues presented by the petition, the answer and the reply involve an interpretation of the provisions of section 114 of the Public Service Law, pursuant to which the commission is authorized to fix temporary rates. The pro-

visions of this statute, so far as applicable here, are as follows:

"§ 114. *Temporary rates.*

"To facilitate prompt action by the Commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records including a list or inventory of all of the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the retirement or replacement of said physical property.

"The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided."

It is not disputed that the company maintained continuing property records, and that it kept its books in such a manner as to show currently the original cost of its physical property and the reserves accumulated to provide for the retirement or replacement of said physical property, and that such books and records set forth these items in such amounts as were determined by the judgment and accounting practice used by the management of the company. It

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is also conceded that the company filed with the commission verified quarterly reports, on forms *furnished by the commission*, containing all of this information as shown on the books and records of the company.

Without going into detail and using approximate round figures, is is sufficient to point out that in the verified report of the company for the quarter ending September 30, 1948, the amount set forth for original cost of physical property less depreciation reserves, was $653,000,000. In arriving at this figure the amount deducted for depreciation was $160,000,000. In determining the base for fixing the temporary rates the commission accepted the book figures of the company as contained in this report, excepting only the item of depreciation. On this item the commission added to the amount of depreciation shown in the report the sum of $95,000,000, with the result that the original cost of the physical property less depreciation, as fixed by the commission, was reduced to $558,000,000. Computed on a net physical property valuation of $558,000,000, as fixed by the commission, the temporary rates, based on the amount of electric service sold during the base year ending September 30, 1948, would produce a return of more than the 5% provided by statute, but computed on the valuation of $653,000,000 shown on the books of the company, the return would be only 4.63%.

The company contends that the commission had no power or authority to estimate the original cost of the physical property less accrued depreciation for the purpose of fixing a base for computing the 5% minimum return, but was required to take the book figures of the company as shown in its quarterly reports to the commission. It further contends that the act of the commission in making such estimate was *ultra vires*, and that the temporary rates based thereon are illegal and void.

The Public Service Commission was created by statute and it may exercise only such powers as are conferred upon it by the Legislature. The Legislature has the right to delegate to the commission the power to perform certain duties, but the commission can act only within the scope of the power so delegated, either expressly or by necessary implication. (*Matter of the Village of Boonville* v. *Maltbie*,

272 N. Y. 40; *Matter of the City of Syracuse* v. *Gibbs*, 283 N. Y. 275.) In the exercise of the powers thus conferred, the commission is required to act within the framework of the statute, both as to the authority granted and the limitations imposed. The sole authority of the commission to fix temporary rates is contained in the provisions of section 114 of the Public Service Law. The problems presented on this review require an interpretation of the meaning of the provisions of that section.

In interpreting the provisions of a statute the language used should be given the usual and ordinary meaning, read in the light of the purpose sought to be accomplished by the act. (*Cooper Snell Co.* v. *State of New York*, 230 N. Y. 249; *Matter of Brooklyn Edison Co.* v. *Davidson*, 269 N. Y. 48; *Wiley* v. *Solvay Process Co.*, 215 N. Y. 584.) The headline to section 114 is "Temporary rates". This indicates that the entire statute is designed to apply to that subject only, and that all of its provisions are integrated and must be considered together. The opening sentence of the text indicates that the purpose of the statute is to facilitate prompt action and avoid delay in rate proceedings, and to that end it provides that the commission may require any utility company to maintain continuing property records and to keep its books, accounts and records in such a manner as to show currently the original cost of its physical property and the reserves accumulated to provide for the retirement or replacement thereof.

It next authorizes the commission to fix temporary rates when in its opinion public interest so requires. Then, for the protection of the public utility, it provides that such temporary rates should be sufficient to produce a return of not less than 5% upon the original cost, less accrued depreciation, of the physical property used and useful in the public service. This last provision, read in conjunction with the provisions in the preceding paragraph of the statute relative to the requirement that the utility company keep books and records to show original costs and accumulated reserves, clearly indicates that the Legislature intended that the base figure on which the 5% minimum return was to be computed, should be determined by taking the valuations

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placed on the items involved by the utility company in the regular course of its business and in accordance with the business judgment and accounting practice adopted by the management.

By these provisions of the statute the Legislature has provided a quick and reasonably accurate method of fixing the minimum return under a temporary rate by the use of figures that can be readily obtained by reference to the books and records of the company. As was said by Judge Crane in *Matter of Bronx Gas & Electric Co.* (271 N. Y. 364, 373): "At least there is some accuracy in these figures; they can be fixed with some certainty and are not dependent altogether upon speculative expert opinion."

Finally, the Legislature, anticipating that cases might arise where, through failure to follow prescribed accounting practices, the duly verified reports to the commission would not show the factors of original cost and accrued depreciation, or one of them, provided that in such cases the commission be empowered to estimate as to either of these factors not shown. In the case at bar the reports of the company did show original cost and the amount of depreciation it had accrued on its books as the same had been determined and set up by the company in the regular course of business, and if the accounting practices involved were faulty or inadequate the commission had long had full jurisdiction to investigate and modify in a proper proceeding. (Public Service Law, § 66, subds. 9, 11.)

The commission appears to contend that the term, "accrued depreciation," as used in the statute, means depreciation which is adequate in amount, and that whenever in the opinion of the commission the depreciation set up on the books and records of the company is inadequate, the commission is empowered to resort to an estimate. There is nothing to support this contention, either in the language of the statute or in the purpose for which it was enacted. The statute deals only with temporary rates. It has no application to permanent rates. The essential elements, in the judgment of the Legislature, necessary for fixing temporary rates, are prompt action, factual information readily ascertainable from proper records, and a reasonable

return fixed at not less than 5%. The phrase, "accrued depreciation," used in the second paragraph of the statute, is tied in with the phrase, "reserves accumulated to provide for the retirement or replacement of said physical property," contained in the first paragraph, and the two phrases must be read together. Thus treated it becomes evident that the Legislature is referring to the same thing by both phrases.

To permit the commission to resort to an estimate whenever in its judgment the amount of accrued depreciation as set up and carried on the books of a utility company is insufficient would destroy the whole pattern of section 114.

The determination of the proper amount to be charged for depreciation of property is one of the most troublesome problems in the field of accounting. More than a half dozen recognized methods of computing depreciation are in use by accountants. If all of these methods were applied to the same problem as many different results would be produced as there were methods employed. If the contention of the respondents were sustained the commission could always resort to an estimate by the simple expedient of adopting a method of computing depreciation which would produce an amount in excess of that produced by the method used by the utility. In result this would be the grant of an arbitrary power to determine the temporary rate. The Legislature neither contemplated nor provided for such a result.

In his memoranda accompanying the order under review, the chairman of the commission states that reported book figures without modification are not the proper basis for determining temporary rates. It is not the function of the commission or of the courts to decide what basis is proper for the fixing of temporary rates. That function belongs to the Legislature alone, and it could prescribe any basis which in its judgment it deemed proper and suitable. We are not concerned here with what the Legislature could or should have done. We are concerned only with what it actually did.

It has been suggested that because the recoupment clause contained in the third paragraph of section 114 provides for the restoration, through the permanent rate, of any loss

which the company might suffer through the imposition of inadequate temporary rates, the company should not be heard to complain because the temporary rates under review were not fixed in accordance with the requirements of the statute. The recoupment provision has no such effect. In the first place, it is designed to provide for the adjustment of rates legally imposed. In the second place, the power to grant restoration cannot confer upon the commission in the imposition of a rate, powers which the Legislature has withheld, nor give it a free hand to ignore the limitations of the statute. The commission was without authority to fix temporary rates except in conformity with the provisions of the law. Recoupment could no more legalize an illegal rate than in the field of criminal law could the restoration of stolen property legalize the larceny by which it was taken.

One other matter merits brief comment. During the base year the company, under a directive of the commission, had charged to operating expense an item of $22,795,888, for depreciation on its electric properties. In computing the company's return on its operations under the temporary rates imposed, the commission deducted the sum of $2,279,000 from this item of depreciation as charged on the books of the company, thereby automatically increasing its operating income by the amount of the deduction. Thus increased, the income return would be substantially advanced toward the 5% minimum provided by statute. The reason assigned for the action was that the $95,000,000, added to accrued depreciation on the commission's estimate, increased the depreciation account to such an amount that the annual additions to this account out of operating expenses should be reduced, and on the opinion of an expert, the commission fixed the reduction at $2,279,000. There is no power or authority conferred upon the commission to justify such action in connection with the fixing of temporary rates, or in computing the return to the company under such rates.

The commission acted beyond its powers and authority in estimating the cost, less accrued depreciation, of the company's physical property. Its acts in fixing the temporary rates were *ultra vires*, illegal and void. The commission's order of December 30, 1948, should be annulled and set aside.

FOSTER, *P. J.* (dissenting):

I accept the conclusion that the phrase "accrued depreciation," used in the second paragraph of the statute, is tied in with the phrase, "reserves accumulated to provide for the retirement or replacement of said physical property", contained in the first paragraph, and that the two phrases must be read together. The commission, itself, evidently so concluded because it accepted the amount of reserves set up for depreciation as indicating in part the extent of accrued depreciation. Nevertheless, I do not think that the commission was bound to accept at their face value the figures shown on the verified reports of the utility company. The statute reads in part—" * * * and if the duly verified reports of said utility company * * * do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation * * *". It hardly seems probable to me that the Legislature intended the word—"show"—to have a literal and rigid interpretation. If that were so, a utility company could put any figures on its report to indicate accrued depreciation and the commission would be obliged to accept them. Obviously, this cannot have been the legislative intent, and hence it seems to me that the matter enters into the realm of a factual situation where an issue is presented as to whether the reports do actually show accrued depreciation. This is a question of fact and the evidence in the record on this issue is conflicting. Hence the commission in the exercise of its administrative and *quasi-judicial* powers had the right to determine such issue, and since there is substantial evidence to sustain its determination we have no authority to interfere. The alternative to this would be to say we have the power, despite the conflicting evidence in the record, to say that the reserves set up for depreciation indicate with substantial accuracy the amount of accrued depreciation. As I view the matter, we have no such power.

The determination of the commission should be confirmed.

Brewster, Deyo and Bergan, JJ., concur with Santry, J.; Foster, P. J., dissents, in a memorandum.

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The decision of this court is stayed for a period of ten days after the entry of an order herein during which time the respondent may, if so advised apply to the Court of Appeals or to a judge thereof for a further stay pending an appeal to that court.

Order of the Public Service Commission, dated December 30, 1948, annulled on the law, with $50 costs and disbursements.

EXHIBIT F

Opinion of the majority of the Court of Appeals reversing the opinion of the Appellate Division (300 N. Y. 196).

Decided December 29, 1949

In the Matter of Consolidated Edison Company of New York, Inc., *Respondent*, against Milo R. Maltbie, et al., Constituting the Public Service Commission of the State of New York, et al., *Appellants*

Fuld, *J.*:

This appeal, taken as of right by the Public Service Commission, requires review of a nonunanimous order of the Appellate Division, Third Department, annulling an order of the commission which fixed temporary rates for electricity supplied by the Consolidated Edison Company of New York, Inc., within the City of New York. In fixing temporary rates, the commission purported to act under the authority of section 114 of the Public Service Law, and whether or not it acted in conformity with that statute, is the question presented in this article 78 proceeding.

Section 114, added to the Public Service Law in 1934 (L. 1934, ch. 287), reads as follows:

"To facilitate prompt action by the commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding, the commission is hereby authorized to require any public utility company to establish, provide and maintain continuing property records, including a list or inven-

tory of all of the physical property actually used in the public service, and to require any public utility company to keep its books, accounts and records in such manner as to show currently the original cost of said physical property and the reserves accumulated to provide for the retirement or replacement of said physical property.

"The commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding. Said temporary rates so fixed, determined and prescribed shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided.

"Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

In May of 1946, the commission, on its own motion, instituted an investigation into all of the rates charged by the Consolidated Edison Company. Hearings begun in June, 1946, continued from time to time over a two and a half year period, until December, 1948. On the last day of the actual hearing, the chairman of the commission, who was presiding, announced that the commission was considering the adoption of a temporary rate order. Over the com-

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pany's protest, the commission on December 30, 1948, entered the order, here under review, that there be a 10% reduction in the total charges made to every consumer for electric service in specified service classifications. The temporary rates, expressly made effective "until final rates are determined", were calculated to accomplish a gross reduction to customers of $21,500,000, which, after adjustment for reduced taxes, is equivalent to a reduction of $12,427,000 in the company's net income.

On a prior appeal recently before us, we held that, in view of the recoupment provisions of section 114, the alleged failure of the commission to follow the requirements of the statute did not warrant an injunction against the enforcement of its order pending appeal, and we accordingly reversed an order of the Appellate Division that granted a stay. See *Matter of Consolidated Edison Co.* v. *Maltbie*, 299 N. Y. 172; see, also, *Matter of Bronx Gas & Elec. Co.* v. *Maltbie*, 271 N. Y. 364.) As a result of that decision, the temporary rates went into operation as of January 10, 1949, and, although the Appellate Division thereafter annulled the commission's order, they continue in effect down to the present through stays of that court's decision pending our review. As indicated, following consideration of the commission's determination on the merits, the Appellate Division concluded that the commission had failed to comply with those requirements of section 114 which prescribe the manner of fixing temporary rates.

The company's threshhold contention that, since the hearings on the rate investigation had been closed, the commission was *functus officio* and, by that token, without power to make a temporary rate order, requires but short answer. (And see *Matter of Consolidated Edison Co.* v. *Maltbie, supra*, 299 N. Y. 172.) The legislature made it exceedingly clear that the commission is authorized to fix temporary rates "pending • • • final determination" of a permanent rate proceeding if the commission be "of opinion that the public interest so requires" (§ 114, 2d par.). The time limitation implicit in the statute is that temporary rates can be imposed only after a permanent rate proceeding has been commenced and before its final determination. As the legislature undoubtedly appreciated,

the facts which make possible a temporary rate order—or the considerations which point to its propriety—may not be adduced or brought to the commission's attention until the final stages of the proceeding, for such proceedings do not follow any set or prescribed course. And, beyond that, the legislature must also have realized, considerable time, even after the hearings are closed and the record made, may frequently be required for ultimate determination of the very complicated rate problem presented.

The principal contention advanced by the company is that the commission violated the mandate of the statute that the temporary rates be fixed and determined so as to yield a return of not less than 5% "upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service" (§ 114, 2d par.).

There is no question that the commission attempted to fix the rates in just the way described and, if the commission's method in ascertaining the amount of accrued depreciation be correct, there is also no question that the result complies with the requirements of the statute. In arriving at its result, the commission found the original cost of the property, as shown on the company's books, to be $813,000,000, from which it deducted $255,000,000, as representing accrued depreciation. This latter sum was made up of $160,000,000, which was the amount carried on the company's books as reserve for depreciation plus an additional sum of $95,000,000, which an engineer employed by the commission testified, was the amount of the deficiency in that reserve. The inclusion of this additional sum is justified by the commission upon the ground that the books of the company "do not show" the amount of accrued depreciation and that, by reason thereof, the commission was authorized by the second paragraph of section 114 to proceed to make its own "estimate" of the accrued depreciation.

The Appellate Division held that the expression, "accrued depreciation", used in that second paragraph of section 114, refers "to the same thing" as the expression, "the reserves accumulated to provide for the retirement or replacement of said physical property", contained in the

first paragraph; that the latter phrase relates to the amount actually carried by the company on its books for the purposes specified; and that, since the books did "show currently" the amount of such accumulated reserves—namely, $160,000,000—the commission was required to use that figure as the amount of "accrued depreciation" and could not undertake to make its own estimate.

In the literature of accounting, including public utility accounting, the term, "accrued depreciation", is by no means synonymous with the term, "reserves accumulated to provide for the retirement or replacement of • • • property." Phrased somewhat differently, the retirement reserve was—under the accounting practice followed generally by electric utility companies until recent years—designed primarily as a reserve for the equalization of retirements as required from time to time and was not intended to reflect or represent accrued depreciation. (See, e. g., *Matter of New York Edison Co.* v. *Maltbie*, 244 App. Div. 685, 691, affd. 271 N. Y. 103; see, also, National Association of Railroad and Utility Commissioners, *Report of Committee on Depreciation* [1943], pp. 4-7.) Certainly, in fixing permanent rates, the amount of accrued depreciation would have to be ascertained, and the reserves shown on the books, no matter how denominated, would not be controlling. (See, e. g., *People ex rel. Consolidated Water Co.* v. *Maltbie*, 275 N. Y. 357, 368-369, affg. 245 App. Div. 866; *Matter of Long Island Lighting Co.* v. *Maltbie*, 249 App. Div. 918; cf. *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 597-598, 606-607.)

It is strongly urged, however, that whatever these terms—accrued depreciation and reserves accumulated for retirement or replacement of property—may mean in other contexts, to draw a distinction between them in the present context would be to distort the legislative design. In making a temporary rate order, expedition and promptness and the ready availability of factual information are prime requisites. In other words, the argument runs, the legislature determined that, in computing temporary rates, reliance should be placed only upon the facts and figures readily disclosed by the company's books, since they had

at least the virtue of definiteness in contrast to the uncertainty that would stem from the traditional use of speculative and varying expert opinion. (See *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364, 372-373.)

These considerations are indeed weighty and may not be minimized. They would, in our view, be conclusive if the commission had the authority to require that the reserves accumulated and shown on the books reflect correctly the accrued depreciation of the property. But we look in vain for such authorization. On the contrary, the commission has twice endeavored to prescribe the method of setting up depreciation reserves and twice have those attempts been held to be beyond the powers conferred upon the commission. (See *Matter of New York Edison Co.* v. *Maltbie, supra,* 271 N. Y. 103, affg. 244 App. Div. 685; *People ex rel. New York Rys. Co.* v. *Public Service Comm.*, 223 N. Y. 373; see, also, 1 Report of Commission on Revision of Public Service Commissions Law [1930], p. 128; cf. *Matter of Rochester Gas & Elec. Corp.* v. *Maltbie,* 298 N. Y. 867.) It is true that this court, in affirming the determination in the *New York Edison Company* case, pointed out that the commission could have elicited from the companies there involved the information sought "by directions of the Commission that would have been open to none of the objections to its present orders" (271 N. Y., at p. 112). The very objection that was there urged by the companies and upheld as valid by the court, however, was that the commission could not compel the companies to set up their reserves on the basis of such information.

The result, therefore, is that, although the commission is empowered to obtain the information as to the amount of accrued depreciation and to require that such information be preserved somewhere in the books and records of the company, the commission lacks the power to require the company to accumulate reserves in any amount other than as the company's own judgment dictates. The reserves accumulated, as "shown currently" on the books, pursuant to the first paragraph of section 114, would consequently continue to be the amount decided upon by the company in the exercise of its own unfettered judgment and not subject to correction by the commission.

It challenges reason to suppose that the legislature purposefully required that the commission accept willy-nilly the company's figures on depreciation regardless of how incorrect or inaccurate they might be. "If that were so," as Presiding Justice Foster stated in the course of his dissenting opinion below, "a utility company could put any figures on its report to indicate accrued depreciation and the commission would be obliged to accept them. Obviously, this cannot have been the legislative intent". (275 App. Div. 475, 483.) While it may be impossible "completely to fathom the legislative mind" (*People ex. rel. New York Central & H. R. R. R. Co.* v. *Public Service Comm.*, 227 N. Y. 248, 257), it is safe to venture that the legislature could not have intended that the commission be treated merely as a clerk making purely mathematical computations. (Cf. *United States* v. *Morgan*, 313 U. S. 409, 415.)

There is certainly nothing in either the express language or the general design of the statute which compels such a result. On the contrary, recognition can be given to the fact that the expressions in the two paragraphs—reserves accumulated and accrued depreciation—are obviously related without forcibly substituting the one for the other. Indeed, such substitution produces illogical and unintended consequences. For example, if the term, "accrued depreciation", were substituted for the phrase in the first paragraph of section 114, "reserves accumulated to provide for the retirement or replacement" of property, the paragraph would authorize the commission to require utility companies to show currently on their books the accrued depreciation of their property, contrary to the decision in the *New York Edison Company* case (244 App. Div. 685, aff'd. 271 N. Y. 103). Similar consequences would follow if the phrase in the first paragraph were substituted for the term "accrued depreciation", contained in the second paragraph. The relationship between the two terms is given effect if it be presumed, as would ordinarily be the case, that, for the purposes of a temporary rate order, the reserves accumulated for retirement or replacement, as shown on the books, represent the accrued depreciation specified in the second paragraph—for such reserves unquestionably

constitute some evidence of accrued depreciation. But this presumption is not made conclusive.

In a case such as the present, where a witness for the commission has testified that the figure for accrued depreciation is $95,000,000 more than the reserve accumulated by the company on its books and a witness for the company itself has indicated that the actual depreciation exceeded the book reserve by some $40,000,000, the commission need not blind itself to the fact that the reserve so accumulated upon the company's books does not—as reasonable men would use the word—"show" the accrued depreciation. The commission was authorized, therefore, to make an estimate of that item. In the light of the evidence adduced, it may not be said that its figure of $255,000,000 was without support. While other and variant figures were in the record, the courts will not and cannot assume that the commission failed to consider them in reaching its estimate, which concededly was not a final determination.

The construction which we have placed upon the statute impresses us as being more in accord with the legislative design, more reasonable and fair, than alternative interpretations. It gives full play to all of the statutory prescriptions and is consistent with all of its objectives. Expedition and promptness will be achieved, for reliance will continue to be placed upon the amount accumulated by the company rather than upon an estimate by the commission, except where the former is known to be misleading. In the latter case, substitution of a more accurate figure would seem to be demanded if meaning is to be given to the statutory direction that "the effect" of temporary rates is an element to be weighed and considered in determing permanent rates. (Public Service Law, § 114, 3d par.; see *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364, 375.) The value of experience under temporary rates is naturally increased in proportion to the correspondence between the rate base for such temporary rates and the base for permanent rates. And, finally, if a temporary rate order is made within the framework of section 114—as it here was—the recoupment provisions of that section apply to prevent any injustice or prejudice to the company even if the temporary rate fixed is later

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found to have been placed at too low an amount. (See *Matter of Consolidated Edison Co.* v. *Maltbie, supra,* 299 N. Y. 172; *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364.)

The order of the Appellate Division should be reversed and the determination of the Public Service Commission confirmed, with costs in this court and in the Appellate Division.

Loughran, Ch. J., Lewis, Desmond and Bromley, J. J., concur with Fuld, J.; Conway and Dye, JJ., dissent and vote to affirm on the opinion of Justice Santry at the Appellate Division.

Order reversed, etc. [See 300 N. Y. 645.]

EXHIBIT G

Memorandum of the Court of Appeals denying reargument and amending the remittitur (300 N. Y. 645).

Decided January 13, 1950

In the Matter of Consolidated Edison Company of New York, *Respondent,* against Milo R. Maltbie, et al., Constituting the Public Service Commission of the State of New York, et al., *Appellants.*

Motion for reargument denied. Motion to amend the remittur granted. Return of remittur requested and, when returned, it will be amended by adding thereto the following: Questions under the Federal Constitution were presented and passed upon by this court, viz., whether section 114 of the Public Service Law of the State of New York and the order of the Public Service Commission, dated December 30, 1948, in Case No. 12455, made pursuant thereto violated any of the rights of the respondent guaranteed by section 1 of the Fourteenth Amendment to the Federal Constitution. This court held that the aforesaid statute and order of the commission did not violate any of the rights of the respondent guaranteed by that provision of the Federal Constitution. [See 300 N. Y. 196.]